Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning Communication No. 669/2015*, **

Communication submitted by:	Z.W. (represented by counsel, Frances Milne)
Alleged victim:	The complainant
State party:	Australia
Date of communication:	20 March 2015 (initial submission)
Date of present decision:	28 November 2017
Subject matter:	Deportation to China
Procedural issues:	Insufficient substantiation of the complaint; exhaustion of domestic remedies
Substantive issue:	Risk of torture
Article of the Convention:	3

1.1 The complainant is Z.W., a national of China born in 1972 and subject to a deportation order from Australia to China. He claims that his deportation would constitute a violation by Australia of article 3 of the Convention. The complainant is represented by counsel.

1.2 On 23 March 2015, the Committee, acting through its Rapporteur on new complaints and interim measures, decided to grant interim measures under rule 114 (1) of the Committee's rules of procedure and requested the State party not to deport the complainant while the complaint was being considered by the Committee.

Factual background

2.1 The complainant presents himself as a former high-level civil servant in the Taiwan Affairs Office of the State Council, a ministry of the Government of China. His role consisted of enabling the expansion of Chinese trading companies.

2.2 On 18 November 2009, the complainant's daughter, who was three years of age at the time, was allegedly kidnapped by the Haidan District police in Beijing while staying with the complainant's mother. The complainant engaged a private security company to locate his daughter, who was found on 19 September 2010. The complainant's mother, who had been knocked unconscious and injured by the kidnappers, left China for Australia to join the complainant's sister.

* Adopted by the Committee at its sixty-second session (6 November–6 December 2017).

** The following members of the Committee participated in the consideration of the present communication: Essadia Belmir, Alessio Bruni, Felice Gaer, Claude Heller Rouassant, Jens Modvig, Ana Racu and Sébastien Touzé.

2.3 On 28 October 2010, the complainant travelled to Australia on a one-year tourist visa to visit his mother and sister, who was an Australian citizen.[1] The complainant's daughter stayed in China with the complainant's father. While in Australia, the complainant allegedly received an email from Beijing containing photographs and a map of the place where the complainant was staying in Australia, suggesting that he was under surveillance. On 9 November 2010, the complainant allegedly received an email from a friend informing him that an arrest order had been issued against the complainant by the Haidan District police and that he was suspected of having committed a criminal offence.

2.4 On 10 December 2010, the Australian Department of Immigration and Citizenship received information from the Beijing office of the Australian Department of Foreign Affairs and Trade that the complainant intended to kidnap his daughter from his wife and that he would be seeking protection in Australia on false documents. The complainant notes that this information was false, given that his daughter had remained in China during his stay in Australia.

2.5 On 19 December 2010, an online magazine called "Boxun News" published a report claiming that US$300 million had gone missing from the Taiwan office of the Government of China and allegedly suggesting that the complainant had played a role in the misappropriation of funds.

2.6 On an unspecified date in December 2010, the complainant allegedly received a telephone call from a Chinese national from the Government of China who offered to transfer 500,000 yuan (approximately US$ 80,000) to the complainant's bank account in Australia and to issue him a European passport: an offer that the complainant turned down.

2.7 On 27 January 2011, the complainant was detained at Sydney Airport as he was returning from Fiji[2] and interviewed by Australian immigration officials. On 28 January 2011, the complainant's tourist visa was cancelled and he was transferred to Villawood Immigration Detention Centre in Sydney, from where he was released only on 17 May 2012. While in detention, the complainant was prescribed medication for diabetes and psychosis. In December 2012, he was transferred to hospital for three weeks, where it was determined that he suffered from neither of those conditions. Nevertheless, the authorities at Villawood Immigration Detention Centre required him to continue to take the prescribed medication. The complainant claims that, by the time of writing, he had developed diabetes and that his mental health is affected by both the medication and his fear of returning to China.

2.8 On 31 January 2011, the complainant applied for a protection visa, which was rejected on 11 April 2011 by a delegate of the Minister for Immigration and Citizenship. The delegate found that the complainant had presented an incredible set of circumstances mixed with intrigue and did not have a genuine fear of harm, nor was there a real chance of persecution occurring.

2.9 The complainant applied for a review of that decision. On 2 June 2011, the Federal Magistrates Court of Australia (now the Federal Circuit Court of Australia) rejected the complainant's application on the basis that he had been untruthful in several respects and had provided conflicting information, in particular regarding his marital status, the persons with whom his daughter was staying in China and the nature and authorship of the phone message informing him about the warrant issued for his arrest in China. The Court further considered that the complainant had applied for a protection visa only after learning that his tourist visa had been cancelled and had therefore acted in bad faith. The Court found a jurisdictional error in the delegate's decision, based on the fact that the delegate had failed to provide the complainant with relevant information received concerning the alleged kidnapping of his daughter and his attempt to re-enter Australia using false documents. Furthermore, the Court stated that the complainant had only had access to his lawyer two hours into the interview procedure. However, the Minister did not grant relief to the

[1] This visa, granted on 13 August 2010, allowed for multiple entries up until 19 August 2011, and for a stay of three months after each entry.

[2] The complainant explains that he went on that trip because his visa required him to leave Australia after each stay of three consecutive months.

complainant since he was considered to have acted in bad faith. The complainant claims that the Court erred, on one hand, by publishing personal details about him and his daughter in the judgment, and on the other, by stating that the complainant held a Taiwanese, rather than a Chinese, passport.[3]

2.10 The complainant appealed against that judgment claiming, inter alia, that the Federal Magistrates Court had erred in finding that the complainant's alleged bad faith was sufficient to cancel his visa. On 20 October 2011, the Federal Court of Australia found no basis for judicial error and dismissed the complainant's appeal.

2.11 Between 2011 and 2012, the complainant's father in China was allegedly visited on several occasions by local police, who asked him to hand over the complainant's daughter in exchange for the cancellation of the arrest warrant against the complainant, a request his father refused on each occasion. Moreover, in March 2011, the complainant's houses and vehicles were confiscated and his four bank accounts were frozen.

2.12 Following a court order issued in China in January 2012, the complainant divorced his wife.

2.13 On 27 February 2012, the Refugee Review Tribunal[4] rejected the complainant's application for a review of the merits of the delegate's decision to refuse him a protection visa. The Refugee Review Tribunal found the complainant's claims to be implausible and noted that he had applied for protection in Australia only after learning that his tourist visa had been cancelled. The Tribunal further noted that the complainant had a propensity to significantly embellish his claims at each stage of the application process. That propensity, and the complainant's failure to seek protection sooner, undermined his credibility. The Tribunal considered the complainant's claim that he had been endangered by the publication of his daughter's name and date of birth, and details about the complainant's passport and protection visa application in the judgment issued by the Federate Magistrates Court but found that there was no evidence to suggest that the judgment had come to the attention of the Chinese authorities and that, in any event, the complainant's identity had not been disclosed in the judgment. Additionally, even if the complainant had been identified by the Chinese authorities as having applied for protection in Australia, there was insufficient evidence to conclude that this would put him in danger in China.

2.14 On 19 March 2012, the complainant sought review of the Refugee Review Tribunal decision. On 31 May 2012, the Federal Magistrates Court found that the Tribunal had failed to alert the complainant that the credibility of his claims was in issue and remitted the matter back to the Tribunal for reconsideration.

2.15 On 8 April 2013, the Refugee Review Tribunal upheld, for the second time, the delegate's decision refusing protection to the complainant. The Tribunal found that the complainant lacked credibility and specifically rejected his claims relating to his employment history,[5] his marital status, his mother's profession,[6] his alleged persecution by the Government of China — including the arrest warrant issued against him — his alleged fear of being blamed for the misappropriation of public funds and being charged and executed if returned to China, his monitoring by the Chinese authorities while in Australia, and his allegations that he had been paid money and told never to return to China and that his daughter had been kidnapped by the Chinese authorities in 2009. The Tribunal further considered that the complainant's claim at the second Tribunal hearing that he was planning

[3] The passport nationality was corrected and the passport number deleted. The amended judgment was published on 13 January 2012.

[4] The Refugee Review Tribunal was a statutory body, which provided a final, independent merits review of decisions made by the Minister for Immigration and Citizenship or delegates of the Minister to refuse to grant protection visas to non-citizens within Australia, or to cancel such visas. On 1 July 2015, the Refugee Review Tribunal was amalgamated into the Administrative Appeals Tribunal.

[5] The complainant had initially stated that he worked for a Chinese company. At the second Refugee Review Tribunal hearing, however, he had claimed to work for the Government of China.

[6] At the first Refugee Review Tribunal hearing, the complainant had stated that his mother was a legal representative of an investment company and had provided evidence to that effect, whereas, at the second hearing, he had stated that she was a retired schoolteacher.

to obtain custody of his daughter in order to bring her to Australia was incompatible with his claims for protection and, in particular, his alleged persecution by the Government of China. Furthermore, the complainant's repeated statements that he would not have applied for a protection visa if his tourist visa had not been cancelled was inconsistent with his protection claims related to the event in which he was allegedly involved in China. The Tribunal noted that, if the complainant had intended to seek protection, he would not have left Australia on 24 January 2011 to travel to Fiji for three days before returning, because his multiple-entry tourist visa only allowed him to stay for three months at any one time. The Tribunal concluded that the complainant's acts showed that he did not fear harm if returned to China and was not in need of international protection. The Tribunal further rejected the complainant's claim that the publication of certain personal details in a judgment meant that the Government of China would be aware of the fact that the complainant had lodged an application for a protection visa and would consider him to be a Taiwanese spy. The Tribunal based that conclusion on the complainant's overall lack of credibility.

2.16 Between December 2012 and mid-2013, the complainant allegedly received a number of calls on his mobile phone from a Chinese woman named K.Z., who was both a senior officer in the Ministry of State Security of China and a director of a German beer company, inviting the complainant to establish a beer import business with her, reselling the beer to Chinese retailers. The complainant declined that offer.

2.17 On 9 June 2013, the complainant's daughter was kidnapped for the second time. The complainant searched for her through the Chinese equivalent of Twitter without any success. He alleges that his posts were repeatedly deleted by the Government of China but that he continued to post new information and had thousands of followers. The Australian Red Cross unsuccessfully offered to search for his daughter. When K.Z. learned that the Red Cross had been making inquiries, she became very angry and told him that, if the Red Cross became involved, she could no longer guarantee his safety and that it was completely unacceptable for the Red Cross to attempt to search for the complainant's daughter in China.

2.18 On 16 June 2013, a Chinese man from Melbourne named "R" allegedly visited the complainant and offered him $A 500,000 in cash to go into business with him. The complainant refused and R later contacted the complainant by phone to repeat the offer but to no avail.

2.19 On 19 July 2013, the complainant received a text message from a Chinese national allegedly working for the Government of China, who warned the complainant that he needed to keep quiet in Australia. The complainant suspects that his psychologist leaked the complainant's phone number to the Government of China.

2.20 On 10 March 2014, the Federal Court of Australia dismissed the complainant's application for judicial review of the second Refugee Review Tribunal decision, finding no legal error. On 27 June 2014, the complainant's appeal against the Federal Court's decision was also dismissed. Lastly, on 5 March 2015, the complainant was denied special leave to appeal to the High Court of Australia.

2.21 The complainant filed two requests for ministerial intervention under sections 48B and 417 of the Migration Act 1958, the latter section providing for intervention where the Minister for Immigration and Border Protection believes it to be in the public interest. Those requests were dismissed on 21 August 2014 and 5 November 2015 respectively.

The complaint

3.1 The complainant claims that his forced return to China would violate his rights under article 3 of the Convention. He submits that, by publishing false information regarding his passport, the Federal Magistrates Court of Australia placed him at serious risk of being considered a Taiwanese agent and, therefore, of being charged with treason, imprisonment and execution if returned to China. Although the Court reissued an amended judgment, the incorrect information was in circulation for three months and, consequently, it was available to the Government of China.

3.2 The complainant contends that, following his immigration detention, the Government of China attempted to force him to work for it in Australia by providing information on businessmen and women of interest to the Government of China. He provides the names of individuals who contacted him on different occasions for that purpose and offered him large amounts of money. He alleges that the attempts of the Government of China to recruit him led to his daughter's kidnapping. He also claims that he has been warned to remain quiet if he wants to see his daughter again.

State party's observations on admissibility and the merits

4.1 In its submissions dated 23 December 2015, the State party argues that the communication is inadmissible because the complainant's claims are manifestly unfounded, or, alternatively, without merit.

4.2 The State party notes that the claims made by the complainant — except those referred to in para. 4.5 below — have been thoroughly considered by domestic administrative and judicial instances, including by the Department of Immigration and Border Protection and, on two occasions, by the Refugee Review Tribunal. Both Refugee Review Tribunal decisions were in turn subjected to judicial review. Robust domestic processes have determined that the complainant's claims were not credible and did not warrant protection under article 3 of the Convention.[7] The State party recalls the Committee's general comment No. 1 (1997) on the implementation of article 3, in the sense that the Committee is not an appellate or judicial body.

4.3 The complainant's protection visa application was rejected because the complainant was considered to have been untruthful about his reasons for travelling to and remaining in Australia. His claim that his wife had bribed the Chinese police to kidnap his daughter in 2009 was also rejected. The delegate concluded that the complainant had circumstances in China that he was avoiding, which may include his assistance relating to investigations into allegations of corruption, either as a witness or as a suspect, and that he introduced claims about his wife and daughter as a means of enhancing his claims through intrigue.

4.4 The State party notes that, on 17 May 2012, the complainant was released from immigration detention and granted a bridging visa. On 23 March 2015, he was detained again.

4.5 The State party notes that a number of the allegations made by the complainant before to the Committee had not been expressly raised before the Chinese authorities. For instance, the complainant claims that his father was visited on several occasions by the Beijing police between 2011 and 2012; however, during the first Refugee Review Tribunal hearing the complainant stated that the police had been in contact with and threatened his father. He suggested that the Governments of Australia and China had colluded but does not substantiate this statement. He did not claim at the domestic level that he had been given medication against his will.

Complainant's comments on the State party's observations

5.1 In his submissions dated 12 December 2016, the complainant states that, on 7 July 2016, his father was granted a permanent visa to join his wife in Australia. On 7 October 2016, the complainant was released from immigration detention for the second time on a six-month visitor's visa. The complainant notes that he received no explanation as to the reasons for granting that visa. He also notes that, a few days after his release, he was contacted by an immigration official, who advised the complainant that his sister should apply for a permanent visa for him under the family reunification provisions.

5.2 On 18 October 2016, the complainant filed a new request for ministerial intervention.

[7] The State party notes that the complainant's claims have been assessed, in particular, under the complementary protection provisions contained in paragraph 36 (2) of the Migration Act 1958, which reflects the non-refoulement obligations of the Government of Australia under the Convention and the International Covenant on Civil and Political Rights.

5.3 On 15 November 2016, the complainant filed an application for permanent residence under the family reunification provisions. On the same date, he was granted a bridging visa enabling him to remain in Australia until 28 days after a decision was made relating to his residence visa application.

5.4 On an unspecified date, the complainant contacted the Chinese consulate in Sydney and sought to renew his passport, which expired in April 2017. Consulate officials advised the complainant that they could not renew his passport because he had entered Australia illegally. The complainant notes that he has no legal status to return to China and that the Government of Australia has not yet determined whether he will be granted a permanent residence visa. The complainant therefore requests the Committee to maintain the interim measures until his application for a residence visa is determined.

Additional submissions by the parties

6 On 12 January 2017, the State party submitted that, since the complainant's application for a permanent residence visa (application for a remaining relative)[8] was still pending, domestic remedies had not been exhausted.

7 On 23 July 2017, the complainant informed the Committee that his permanent residence visa application had been refused by the Department of Immigration and Border Protection, despite having been advised by an official from that Department to file such an application.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any complaint submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been, and is not being examined under another procedure of international investigation or settlement.

8.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. This rule does not apply where it has been established that the application of those remedies has been unreasonably prolonged or is unlikely to bring effective relief.[9] The Committee takes note of the State party's argument that domestic remedies had not been exhausted while the complainant's application for permanent residence was under consideration. However, the Committee notes that such application was rejected on 23 July 2017. Accordingly, the Committee considers that it is not precluded by the requirements of article 22, paragraph 5 (b), of the Convention from considering the communication on the merits.

8.3 The Committee takes note of the complainant's claim that the publication of incorrect information relating to his passport in the Federal Magistrates Court judgment has put him at risk of being considered an agent of Taiwan and, therefore, of being charged with treason, imprisoned and executed if returned to China.

8.4 The Committee recalls that, for a claim to be admissible under article 22 of the Convention and rule 113 (b) of its rules of procedure, it must rise to the basic level of substantiation required for the purposes of admissibility.[10] In the present case, the Committee notes that the judgment in question was later corrected and reissued on 13 January 2012. Furthermore, this claim was assessed twice by the Refugee Review Tribunal, which found no evidence to suggest that the judgment in question had come to the attention of the Chinese authorities and that, in any event, the complainant's identity had not been disclosed in the judgment. In the circumstances of the present case, the Committee observes

[8] The State party notes that this type of visa allows a person whose only close relatives are living in Australia to remain in Australia as a permanent resident.

[9] See, inter alia, *E.Y. v. Canada* (CAT/C/43/D/307/2006/Rev.1), para. 9.2.

[10] See, inter alia, *Z. v. Denmark* (CAT/C/55/D/55/2013), para. 6.3.

that the complainant has failed to submit convincing arguments to show that the assessment of his claim by the Refugee Review Tribunal was arbitrary, lacking in due process or failed to respect his rights.

8.5 The Committee takes note of the complainant's claim relating to an alleged attempt by the Government of China to involve him in Australian business circles and the resulting abduction of his daughter. The Committee notes that the complainant has described several unsuccessful attempts by unknown Chinese agents to offer him large amounts of money and other benefits in exchange for doing business with them. However, the complainant has failed to provide any detailed information or evidence in support of these seemingly unrelated events, which were separated in time, occurring in December 2010 and December 2012 — July 2013, or to articulate how these facts might justify the claim of a risk of a violation of article 3 of the Convention in case of return to China.

8.6 Finally, the Committee observes that the complainant's claims relate to alleged continuous persecution by the Chinese authorities originating from his past work for the Government of China. The Committee notes, however, that the complainant's allegations in this respect were reviewed on several occasions by the Australian authorities, including by the former Federal Magistrates Court and, on two occasions, by the Refugee Review Tribunal. These bodies found the complainant's statements to be inconsistent and contradictory in several fundamental aspects, including the complainant's and his mother's employment situations, the complainant's marital status, the alleged abduction of his daughter and the arrest warrant allegedly issued against him. On this basis and taking into account the fact that the complainant had applied for a protection visa only after the cancellation of his tourist visa and after having travelled to Fiji, these bodies concluded that there were no grounds to believe that the complainant would be at risk in case of return to China.

8.7 In the light of the foregoing, the Committee considers that the complainant has failed to substantiate, for the purpose of admissibility, the existence of a risk of a violation of article 3 of the Convention in case of return to China and concludes, in accordance with article 22 of the Convention and rule 107 (b) of its rules of procedure, that the complaint is manifestly unfounded.

9. The Committee therefore decides:

(a) That the communication is inadmissible under article 22 of the Convention;

(b) That the present decision shall be communicated to the complainant and to the State party.